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THE FORMATION OF A UNILATERAL CONTRACT

The important distinctions between unilateral and bilateral contracts are slowly coming to be recognized. The case of *Brackenbury v. Hodgkin* (1917, Me.) 102 Atl. 106 affords an excellent opportunity for setting forth some of these distinctions.¹ The exact words used by the parties are not given in the opinion, but the facts are reported by the court substantially as follows: The defendant wrote a letter to her son-in-law, the plaintiff, offering that if he would move from Missouri to Maine and would care for the defendant during her life, he should have the ownership of the home place after the defendant's death and the use of it during her life. The plaintiff moved as requested and cared for the defendant for a few weeks. Trouble ensued, caused, as the court finds, by the unreasonable demands and bad disposition of the defendant, whereupon she conveyed the premises

¹ Two other recent cases of unilateral contracts, involving the problem of *Shadwell v. Shadwell* (1860) 9 C. B. N. S. 159, are discussed at length in this number in an article at page 362.

to her son—a co-defendant. The plaintiff filed a bill in equity to compel a reconveyance from the son to his mother, to restrain the prosecution of a statutory ejectment suit brought by the son, and to obtain a decree that the mother should hold the land in trust for the plaintiff. The relief asked was granted in full.

The court says: "The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. . . . The plaintiff here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified acts. . . . The existence of a completed and valid contract is clear."

In this case the defendant was the offeror, and by her letter she created in the plaintiff the power to form a contract between them by accepting.² What was this power and how was it to be exercised? The defendant has clearly offered to undertake the duty of allowing the plaintiff to enjoy the use of certain lands during her life and of conveying to him the fee therein at her death. Did she in return ask the plaintiff to promise to support her until her death? No such promise was asked for in express terms, nor was such a promise expressly made. Nevertheless, it would not be unreasonable to find an implication of such a promise both in the offer and in the acceptance. In such case, the contract would be bilateral, for each of the parties would be undertaking to perform certain acts in the future. The contract would include *mutual* rights and *mutual* duties. The act of the plaintiff in moving to Maine might have been understood by both parties as an expression of an intention to undertake the duty of supporting the defendant during her life; that is, this act would be a *promissory* act. If such was the fact, the decision is justifiable; for the contract was fully completed,—the requested promissory acceptance had been given, and the offeror had knowledge of it.

The court expressly holds, however, that the contract was unilateral. This means that the plaintiff was requested to make no promise, either by words or by other action. He undertook no duty for breach of which he would be bound to pay damages. He could have abandoned the place in Maine and ceased to support the defendant, without committing any breach of contract. Does it not follow from this that the defendant was not bound, either, and still had the power and privilege of revoking her offer?

Suppose the words of the defendant were as follows: "I promise to convey my land to you in return for your moving to Maine and caring for me *during my life*." Such words as these indicate that the

² For a discussion of the whole subject of the formation of contract from the present writer's point of view, see Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL, 169.

power of the offeree can be exercised only by a long series of acts extending through the entire life of the defendant. Acceptance would not be complete, and the contract would not be formed, until the instant of the defendant's death.³ Could not the defendant, therefore, at any time prior to her death and prior to complete acceptance, revoke her offer by giving notice to the plaintiff? In general, an offer is supposed to be revocable prior to acceptance. The present case indicates how very inequitable such a revocation might be.⁴ A quasi-contractual action for *quantum meruit* would not do justice; for the defendant has received only a few weeks' support; and to recover the value of this would not compensate the plaintiff for breaking up his home in Missouri and moving to Maine. In many cases, a very simple remedy would be to hold that the plaintiff's power of acceptance is irrevocable after the plaintiff has done some substantial act in part performance of the requested acceptance. In the present case, however, the plaintiff is deprived of the *physical* power to accept, even though he may still have the *legal* power. Readiness to support is not the same as actual support and is not the specified acceptance.⁵ Perhaps, the chief criticism of the suggested rule of irrevocability is that it operates with too great severity against the offeror.⁶

There is a third possible assumption in the present case. Suppose the defendant said: "I promise to convey my land to you *in return for* your moving to Maine, and *on condition* that you support me during my life." This, too, is an offer of a unilateral contract. The agreed equivalent for the defendant's promise is the plaintiff's action in

³ It might be questioned whether in such a case the formation of a contract is possible, for the reason that death would revoke the offer. Surely, however, no court would give weight to such a suggestion. Even if the offer is revocable (and it probably is not), the acceptance is complete, and the revocation by death does not take effect prior to the completion of the acceptance. If it be true that two living persons are necessary to make a contract, in this case there were two living persons during the entire period of formation. To adopt the opposite view would be worse than mediæval casuistry.

⁴ It has been vigorously denied that the revocation is inequitable and as firmly asserted that no offer can be irrevocable. See I. Maurice Wormser, *The True Conception of Unilateral Contracts* (1916) 26 YALE LAW JOURNAL, 136, following Langdell, *Summary of the Law of Contracts* (1880) secs. 4, 178. In support of the text above, see the article cited in note 2, *supra*.

⁵ It appears to be the opinion of the New York Court of Appeals in *DeCicco v. Schweizer* (1917, N. Y.) 117 N. E. 807, that the requested act must be completed before a contract results. "Until marriage occurred the defendant was not bound. It would not have been enough that the count remained willing to marry." Similarly, a part performance with readiness to complete was held insufficient in *Pain v. Bastwick* (1621) Cro. Jac. 583. Yet in the present case the court seems to think it enough that the plaintiff "remained willing" to support the defendant during her life.

⁶ Such severity could be avoided as suggested in 27 YALE LAW JOURNAL, pp. 195, 196.

moving to Maine.⁷ The support of the defendant during her life is a condition precedent to the plaintiff's right to an immediate conveyance. The supposed "contract" is formed upon the plaintiff's arrival in Maine, and thereafter it is too late for the defendant to revoke her offer. It is probable that this was the view that was actually held by the court. In this view the acts of moving to Maine operate to create new legal relations called contract. These relations would include the right not to be disturbed in possession of the home place, the privilege of occupying that place, and the legal power to create a right to the fee by supporting the defendant during her life. These relations were all irrevocable by the defendant. As a correlative to the plaintiff's conditional right to the fee, there would be the conditional duty of the defendant to cause such acts to be done as will convey the fee. The acts of the plaintiff in supporting the defendant for life are facts subsequent to the formation of the contract (the preceding relations), and precedent to the plaintiff's right to an immediate conveyance of the fee.

In cases of this sort, the parties may not be at all clear in their own minds as to the legal relations that they desire to create; and the court must determine the legal relations, not because the parties clearly assented to them but because they willed to do certain acts that ought to result in such legal relations.⁸ If the court holds that the legal relations are as above, the remedy in the present case was a proper one. The decree is one for specific reparation and specific performance. The defendant is ordered not to disturb the plaintiff's possession; also to hold the fee in trust for the plaintiff. Whether or not the plaintiff will ever be entitled to a conveyance of the fee is a question yet to be determined. His right to such a conveyance is conditional upon support of the defendant during the rest of her life. It does not seem probable that the plaintiff will be able to fulfil this condition after the litigation and ill-will between him and the defendant. Of course, it will be the defendant who is causing the non-fulfillment of this condition; but a court of equity would hardly compel her to continue to live with the plaintiff. She has *perhaps* promised by *implication* that she would not prevent the plaintiff from fulfilling the conditions; but even if her conduct is a breach of this

⁷ In this case, also, the problem just discussed above is involved; for the defendant might telegraph her revocation after the plaintiff had sold his home and started for Maine. If the defendant had sent such a telegram the court would no doubt have pushed the moment of acceptance still further back. In *Martin v. Meles* (1901) 179 Mass. 114, 60 N. E. 397 Mr. Justice Holmes said: "If necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendant's obligation."

⁸ Perhaps this is a further step in the development away from *contract* back to *status*. Cf. Nathan Isaacs, *The Standardizing of Contracts* (1917) 27 YALE LAW JOURNAL, 34.

implied promise or is tortious, it does not follow that the plaintiff should get the entire compensation without rendering any of the service. This is a separate problem. It may be, however, that the present decree will eventually result in the plaintiff's obtaining the fee, on the theory of constructive service and on the ground that the defendant has waived the condition by preventing its fulfillment.

A. L. C.

"GOING VALUE" FOR PURPOSES OF RATE REGULATION

A recent California case raises in an interesting form the much disputed question, when or to what extent "going value" is value upon which a public utility is entitled to base its rates. *San Joaquin Light & Power Corp. v. Railroad Commission* (1917, Cal.) 165 Pac. 16. It is generally admitted that "going value" is, to some extent at least, an item of value for rate purposes,¹ but there is much confusion with respect to the questions when and to what extent it constitutes such value.² In the latest ruling on the subject by the United States Supreme Court³ it was held that "going value" is "a property right and should be considered in determining the value of the property upon which the owner has a right to make a fair return." This holding, it seemed at first, had practically settled the whole conflict; for, inasmuch as the Supreme Court is, under the Constitution, the court of last resort upon the question of valuation for rate-making purposes,⁴ it was to be supposed that other tribunals would follow the Supreme Court upon this question. On the contrary, however, there has been a tendency on the part of many authorities to construe away the apparent effect of the Supreme Court's decision.

A striking illustration of this tendency is the California case above cited. In that case the court affirmed the decision of a commission⁵ in which, it seems, no allowance whatever was made for "going

¹ *Des Moines Gas Co. v. City of Des Moines* (1915) 238 U. S. 153; *People v. Wilcox* (1914) 210 N. Y. 479, 104 N. E. 911; *Public Service Gas Co. v. Board of Commissioners* (1913, Sup. Ct.) 89 N. J. L. 463, 87 Atl. 651. See Beale & Wyman, *Railroad Rate Regulation* (2d ed.) secs. 276, 280.

² *Hermann v. Newtown Gas Co.* (1916, N. Y. P. S. C., 1st Dist.) P. U. R. 1916 D, 825; *People v. Wilcox*, *supra*; *Rich v. Biddeford, etc. Co.* (1917, Me. P. U. C.) P. U. R. 1917 C, 982; *Appleton Waterworks Co. v. Railroad Commission* (1913) 154 Wis. 121, 142 N. W. 476; *Re Clarksburg Light & Heat Co.* (1916, W. Va. P. S. C.) P. U. R., 1917 A, 577; *East Bakersfield, etc. Association v. San Joaquin etc. Corporation* (1916, Cal. R. C.) P. U. R. 1916 C, 380 (the principal case before the Commission); and numerous other cases. See Whitten, *Valuation of Public Service Corporations*, secs. 550-644.

³ *Des Moines Gas Co. v. City of Des Moines*, *supra*.

⁴ *Public Service Gas Co. v. Board of Commissioners*, *supra*.

⁵ *East Bakersfield, etc. Association v. San Joaquin, etc. Corporation*, *supra*.